172

(2)

No. 10-304

Supreme Court, U.S.
FILED
SEP 28 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LOREN J. ZUTZ; ELDEN J. ELSETH,

Petitioners,

v.

JOHN NELSON; ARLYN STROBLE; NICK DREES; DOUGLAS KAMROWSKI; ROUGHRIDER LEGAL SUPPORT SERVICES, INC.; DANNY OMDAHL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF KAMROWSKI AND ROUGHRIDER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD P. MAHONEY
Counsel of Record
VICTOR LUND
MAHONEY, DOUGHERTY & MAHONEY, P.A.
801 Park Avenue
Minneapolis, MN 55404
(612) 339-5863
rmahoney@mahoney-law.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI	1
OPINIONS BELOW	1
ARGUMENT	1
I. PETITIONERS FAILED TO PRESERVE THE ISSUE WHETHER INJURY TO REPUTATION ALONE STATES A FEDERAL CLAIM	1
II. THE COURTS BELOW PROPERLY FOUND NO PLAUSIBLE SHOWING OF ANY CAUSATIVE NEXUS BETWEEN THE ACTS OF RESPONDENTS AND THE INJURIES ALLEGEDLY INFLICTED UPON PETITIONERS BY DECISION OF THE BOARD AS A WHOLE	2
III. RES JUDICATA BARS ANY POTENTIAL FEDERAL CLAIM IN FAVOR OF PETITIONERS	5
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 7

Cardinale v. Louisiana, 394 U.S. 437 (1969).....2

Fichter v. Kadrmas, 507 N.W.2d 72 (N.D. 1993) 7

Paul v. Davis, 424 U.S. 693 (1976) 1

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992).....2

Zutz and Elseth v. Kamrowski and RoughRider, ___ N.W.2d ___, 2010 ND 155 (N.D. 2010).....5

STATUTES

28 U.S.C. § 1738 6

42 U.S.C. § 1983 6

SECONDARY AUTHORITY

U.S. Constitution, Article IV, Section 1 6

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Douglas Kamrowski and RoughRider Legal Support Services, Inc. submit this memorandum in opposition to the Petition of petitioners Loren J. Zutz and Elden J. Elseth for a Writ of Certiorari docketed in this Court on August 31, 2010.

OPINIONS BELOW

Respondents Kamrowski and RoughRider take no issue with petitioners' statement of the opinions below, basis for federal jurisdiction, citation to the relevant provisions, and statement of the case.

ARGUMENT

Reasons to Deny the Petition

I. PETITIONERS FAILED TO PRESERVE THE ISSUE WHETHER INJURY TO REPUTATION ALONE STATES A FEDERAL CLAIM.

One issue which petitioners purport to raise is whether this Court should revisit its decision of *Paul v. Davis*, 424 U.S. 693 (1976) and reconsider its holding therein that injury to reputation, standing alone, does not assert a violation of any federally guaranteed right; in other words, that defamation is purely a matter of state law, not federal law.

Petitioners failed to preserve this issue. They did not raise it in any court below. The decisions of the district court and Eighth Circuit Court of Appeals do not address the issue because petitioners did not raise it. Petitioners raised what is known as a stigma/plus claim. They argued that they had the plus, but they never argued that they should have a federal claim in the absence of the plus.

Absent exceptional circumstances, this Court does not review issues not presented in the lower courts or issues otherwise not sufficiently developed to permit a meaningful review in this Court. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645, 646 (1992); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). This Court is a court of review rather than a court of original jurisdiction except in highly unusual circumstances. There is no reason why this Court should accept original jurisdiction of this issue.

II. THE COURTS BELOW PROPERLY FOUND NO PLAUSIBLE SHOWING OF ANY CAUSATIVE NEXUS BETWEEN THE ACTS OF RESPONDENTS AND THE INJURIES ALLEGEDLY INFLICTED UPON PETITIONERS BY DECISION OF THE BOARD AS A WHOLE.

The Eighth Circuit affirmed dismissal of petitioners' complaint on the basis that their proposed amended complaint "fails to plausibly allege a causal connection between the appellees' [respondents'] conduct and any constitutional deprivation."

(Petitioners' Appendix 15a) This conclusion is manifestly correct. Petitioners have adduced no sound reason to review the decision. This Court should deny the Petition for Writ of Certiorari.

The additional harm which petitioners allege are actions taken by the entire Watershed District Board. There are seven members of the Board, of whom petitioners were two at the time of the acts complained of. The respondents include two other Board members (Nelson and Stroble), leaving three members of the Board not parties. Any action of the Board must be taken by a majority thereof. Based thereon, the courts below found an absence of any allegation of a plausible causal nexus between this additional alleged harm and any actions by respondents.

This is particularly true as applied to Kamrowski and RoughRider. Kamrowski investigated at the request of the Marshall County Attorney. He reported to the Marshall County Attorney, and only to the Marshall County Attorney, per his instructions. The averment that Kamrowski knew that his report would be made public is a mere conclusory allegation and irrelevant anyway. Kamrowski did not report to the Board. He did not vote on the Board. He has never been a member of the Board. He did not tell the Board how to vote. He does not advise the Board. To the extent his report came to the attention of the Board, it was done by others and in connection with the county attorney's opinion that he found no basis to take any action against petitioners.

The Petition for Writ of Certiorari scarcely mentions Kamrowski and RoughRider at all. They appear therein only as "a private investigator from North Dakota [who] sought to defame [petitioners]." (Petition at 3) The Petition recites no facts tending to show a causal connection between RoughRider and the other harms that allegedly befell petitioners. There are no such other facts. The pertinent facts are that the Marshall County Attorney, at the request of the Marshall County Commissioners, asked RoughRider to investigate goings-on at the Watershed District Board. Pursuant thereto, Kamrowski investigated and reported, per his instructions, to the county attorney only. At some point, the entire Board, or a majority thereof, took the votes of which petitioners now complain, i.e., rescinding petitioners' check-signing authority and the other alleged acts. But these facts show a complete absence of any causal connection between anything that RoughRider did and the alleged injuries.

Under these circumstances, Kamrowski and RoughRider are so far removed from the alleged additional injuries that any inference of a causal connection between the report and those injuries is a matter of gross speculation, comparable to a mere metaphysical doubt. There is no plausible inference that the acts of Kamrowski and RoughRider had anything to do with the alleged additional harms. The courts below were manifestly correct in so deciding. Petitioners have alleged no sound reason to review that decision. The only specific argument petitioners

assert is that chronology should produce the requisite inference of causation. (Petition at 8) (*See also* 8th Circuit discussion at Appendix 14a). But simply asserting that chronology should produce an inference of causation does not make it so. Petitioners are simply restating the ancient logical fallacy of post hoc, ergo propter hoc. Chronology produces no valid inference of causation. Petitioners have adduced no sound reason why the rule should be otherwise in this case.

III. RES JUDICATA BARS ANY POTENTIAL FEDERAL CLAIM IN FAVOR OF PETITIONERS.

The decision of the district court dismissed all federal claims asserted by petitioners with prejudice and denied any state claims without prejudice thereby inviting petitioners to assert their state claims in state court. Petitioners did so. They sued Kamrowski and RoughRider in North Dakota state court alleging a claim of defamation in several different counts. That action ended in dismissal of all claims by the North Dakota District Court, Grand Forks County, affirmed on appeal by the North Dakota Supreme Court. *Zutz and Elseth v. Kamrowski and RoughRider*, ___N.W.2d ___, 2010 ND 155 (N.D. 2010). Accordingly, the North Dakota state action has been fully and finally resolved by judgment of dismissal in favor of Kamrowski and RoughRider. No further appeals are available under North Dakota state law. Petitioners submitted a timely request for rehearing before

the North Dakota Supreme Court on August 31, 2010, which that court has now denied.

Based on that decision of the North Dakota Supreme Court, any federal claims by petitioners are precluded by the doctrine of res judicata. Petitioners allege violation of federal rights, but the only alleged mechanism of any such violations is by defamation. They allege that the other harmful acts taken by vote of the Board as a whole were motivated by a supposed campaign of defamation against them. They plead no other potential source of the alleged injury. If no one defamed petitioners, they have no violations of federal (or state) rights to complain about. A viable claim for defamation against RoughRider is a necessary factual predicate to any recovery by petitioners.

The North Dakota Supreme Court has fully and finally determined that petitioners have no actionable claim of defamation against Kamrowski and RoughRider. Any further federal proceedings against Kamrowski and RoughRider would be in derogation of that North Dakota judgment.

The Full Faith and Credit Clause of the U.S. Constitution, Article IV, Section 1, may not require a federal court to give full faith and credit to judgments of state courts in subsequent federal litigation. However, the Full Faith and Credit Act, 28 U.S.C. § 1738, provides that state judgments shall be given the same effect in subsequent federal litigation as they would have in the state that issued them. The federal civil rights statutes, including 42 U.S.C. § 1983, do not

create any statutory exception to the Full Faith and Credit Act. *Allen v. McCurry*, 449 U.S. 90, 104 (1980). North Dakota subscribes to the doctrine of res judicata. *Fichter v. Kadrmas*, 507 N.W.2d 72, 74 (N.D. 1993).

In order to recover against Kamrowski and RoughRider in any continued federal litigation, petitioners would necessarily have to show that Kamrowski and RoughRider defamed them. The North Dakota Supreme Court has found that petitioners have no actionable claim for defamation against Kamrowski and RoughRider. That judgment is binding, is final and entitled to full faith and credit by virtue of federal statute, if not the Constitution. Accordingly, petitioners cannot proceed with further federal litigation. Any review by this Court would be moot.

CONCLUSION

For all the above reasons, respondents Kamrowski and RoughRider request that this Court deny petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

RICHARD P. MAHONEY
Counsel of Record
VICTOR LUND
MAHONEY, DOUGHERTY & MAHONEY, P.A.
801 Park Avenue
Minneapolis, MN 55404
(612) 339-5863
rmahoney@mahoney-law.com